RESPONSE REQUEST

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No. 04-9728

SUPREME COURT U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

DONALD CURTIS SAMSON,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

MARTIN S. KAYE
Supervising Deputy Attorney General

RONALD E. NIVER
Deputy Attorney General
Counsel of Record

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5859
Fax: (415) 703-1234

Counsel for Respondent

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QUESTION PRESENTED

Does the Fourth Amendment permit the search of a parolee on a public street to determine whether he is complying with the conditions of his parole?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-9728

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STATEMENT

The evidence adduced at the suppression hearing (S.H.) reflected that at 5:34 p.m. on September 6, 2002, San Bruno Police officer Alex Rohleder saw petitioner Donald Curtis Samson walking down the street with a woman and baby in the vicinity of Angus Avenue and Mastick Street. S.H. 20-21. Rohleder recognized petitioner from a "prior contact," involving an arrest for an "incident" with his girlfriend. S.H. 21, 25. At that time petitioner said the "police weren't going to take me back to prison." S.H. 34. On the present occasion, "under the impression that he might have a parolee at large warrant," the officer requested permission to speak with petitioner. S.H. 21. Asked whether a parole warrant was outstanding against him, petitioner replied that "he had already taken care of it. And he was released from custody."

S.H. 21-22.

Officer Rohleder radioed his dispatcher and was informed that petitioner was on parole but that the warrant was no longer outstanding. S.H. 22, 26-27, 28, 52. Nevertheless, the officer decided to search petitioner "[b]ecause it's a condition of his parole. I believe that being [a] parolee, that he needs to make sure he's still obeying the laws." S.H. 28. Although Rohleder does not "go after [all parolees] all the time," S.H. 29, he does search them on a "regular basis." S.H. 35. If a "parolee or person [is] subject to [a] search or seizure [condition], I would search them. . . ." S.H. 36.

Rohleder's search of petitioner disclosed methamphetamine in a plastic baggie secreted in a cigarette box in his left breast pocket. S.H. 22-23. Petitioner was then arrested. S.H. 52.

Following the denial of his motion to suppress on December 13, 2002, C.T. 43, a San Mateo County jury convicted petitioner on March 24, 2003. C.T. 88, 158. On April 21, 2003, the trial court sentenced petitioner to state prison for seven years, based on his current conviction and a prior felony conviction. C.T. 89, 174, 176.

On October 14, 2004, the California Court of Appeal, First Appellate District, affirmed the judgment of conviction. Pet. App. A. On January 12, 2005, the California Supreme Court denied review. Pet. App. B.

ARGUMENT

In *People v. Reyes*, 19 Cal. 4th 743, 80 Cal. Rptr. 2d 734, 968 P.2d 445 (1998), the California Supreme Court held that the search of a parolee, who is "on notice that his activities are being routinely and closely monitored," "may be reasonable despite the absence of particularized suspicion." *Id.* at 753. Petitioner submits that this rule is constitutionally unacceptable, arguing that reasonable suspicion should be required to justify a parole search. He further argues that this Court must decide this issue to resolve what he perceives to be a conflict in the decisional law on this question. Petitioner is incorrect in both respects. The California rule is consistent with this Court's Fourth Amendment jurisprudence, and no conflict requires resolution by this Court.

A. The California Rule Does Not Conflict With The Authorities Cited By Petitioner

Petitioner's claim that the California rule allowing suspicionless searches of parolees "conflicts with other states' courts and federal courts of appeals," Pet. at 8, is either inaccurate or beside the point. First, *Reyes* does not conflict with this Court's decisions in *Griffin v. Wisconsin*, 487 U.S. 868 (1987) or *United States v. Knights*, 534 U.S. 112 (2001). Both cases held that the warrantless search of a probationer's house was supported by reasonable suspicion.

Neither case held that it was required, and *Knights* specifically declined to "address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." *Knights*, 534 U.S. at 120 n.6. Perhaps more importantly, because both cases involved the searches of houses, neither addressed the question whether the suspicionless search of a parolee's person was reasonable under the Fourth Amendment.

Decisional law of the Court of Appeals for the Ninth Circuit does not conflict with *Reyes*. In *United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004) (en banc), referring to the suspicionless parole search of a house, the court "assume[d] for purposes of our decision, [but need not and do not decide,] that the parole search was unlawful." *Id.* at 1053. The suspicionless parole search of a person was not at issue. Significantly, five judges concluded that the suspicionless search of the house was permissible. *Id.* at 1062-1076. The three dissenters who believed the search violated the Fourth Amendment based their conclusion on the fact that the parole search condition did not permit a search for a pre-parole offense. *Id.* at 1082-1097.

In *Moreno v. Baca*, 400 F.3d 1152 (9th Cir. 2005), the court said in dictum that reasonable suspicion was necessary to justify a parole search. *Id.* at 1163. However, the court *held* that the parole search rationale was unavailable to

uphold the search because the officers did not know of the suspect's parole status until after the conclusion of the search. *Id.* at 1164-1166, 1168. Under California law, the result would be the same, for the California Supreme Court has held that the "police cannot justify an otherwise unlawful search of a residence because, unbeknownst to the police, a resident of the dwelling was on parole and subject to a search condition." *People v. Sanders*, 31 Cal. 4th 318, 332, 2 Cal. Rptr. 3d 630, 73 P.3d 496 (2003). For these reasons, no authoritative decision of the Ninth Circuit conflicts with *Reyes*.

Nor do petitioner's other authorities support his claim of conflict. *United States v. Loney*, 331 F.3d 516 (6th Cir. 2003), and *United States v. Carnes*, 309 F.3d 950 (6th Cir. 2002), both involved the search of the parolee's home. Additionally, the parole condition in each case differed markedly from that approved by *Reyes*. The Ohio parole condition at issue in *Loney* required "reasonable grounds" to justify a search. 331 F.3d at 518. Likewise, in *Carnes*, the court found that the parole agreement did not allow "police to be able to search [the parolee] without probable cause or a warrant." 309 F.3d at 963.

Both *State v. Bonner*, 811 So.2d 1151 (La.App.2002), and *Commonwealth v. Hughes*, 575 Pa. 447, 836 A.2d 893 (2003), involved the search of a dwelling. Consequently, they do not

conflict with the rule allowing a suspicionless search of a parolee's person.

Finally, *Knox v. Smith*, 342 F.3d 651 (6th Cir. 2003), involved the arrest of a parolee pursuant to a warrant. The court expressed no opinion concerning the warrantless search of a parolee in a public place.

Petitioner's suggestion that the decisional law of other states conflicts with *Reyes* is incorrect for a more fundamental reason. Petitioner's claim that the search was unlawful is, ultimately, a challenge to the California parole system and its operating procedures. Because each State is different, its institutions, including its parole system, must reflect those differences in a democratic society. California has the nation's highest rate of recividism. *United States v. Crawford,* 372 F.3d at 1069 (Trott, J., concurring). The operation of the parole systems in Ohio, Pennsylvania, Louisiana, Illinois, Michigan and any other state thus has limited relevance in determining the utility and appropriateness of the procedures employed in California in addressing the "overwhelming" task of managing its parolees. The *Reyes* rule, which allows suspicionless parole searches, but forbids those which are arbitrary, capricious, or intended to harass, does not conflict with this Court's Fourth Amendment jurisprudence and serves California's vital need to supervise its parolees. Consequently, the grant of a writ of certiorari would be inappropriate.

B. This Court's Jurisprudence Supports The California Rule

1. The Issue

To begin with, it must be emphasized that petitioner is challenging only the search of a parolee's person in the absence of suspicion that he or she was about to commit an offense. Petitioner does not, because he cannot, contend that suspicionless searches of a parolee's home or car offend the Fourth Amendment. Subjected to a search of his person on a public street, petitioner is without standing to make such an argument.

Second, petitioner apparently does not contend that reasonable suspicion is necessary to justify the detention of a parolee. Because that quantum of suspicion suffices to permit the detention of a citizen who is not a parolee, *Terry v. Ohio*, 392 U.S. 1 (1968), any similar requirement as applied to a parolee would render his parole status meaningless in justifying the reasonableness of his detention. Consequently, it is not disputed by petitioner that a suspicionless detention of a parolee is permissible under the Fourth Amendment.

2. The Balance Of Interests

"[T]he reasonableness of a search is determined 'by assessing on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to

which it is needed for the promotion of legitimate governmental interests.'" *Unites States v. Knights*, 534 U.S. 112, 118-119 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). The status as a parolee subject to search "informs both sides of the balance." *United States v. Knights*, 534 U.S. at 119.

3. The Parolee's Interest

A parolee enjoys a liberty interest limited by the reasonable conditions of the parole. "Parole is a 'variation on imprisonment of convicted criminals,' [citation], in which the State accords a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of release. In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements." *Penn. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 365 (1998). "As a convicted felon still subject to the [California] Department of Corrections, a parolee has conditional freedom – granted for the specific purpose of monitoring his transition from inmate to free citizen." *People v. Reyes*, 19 Cal. 4th at 752, 80 Cal. Rptr. 2d at 739, 968 P.2d at 450. The parole search condition, intended to ensure that the parolee corrects his behavior and to protect society from future criminal violations, *United States v. Knights*, 534 U.S. at 119; *People v. Reyes*, 19 Cal. 4th 750, 80

Cal. Rptr. 2d at 738, 968 P.2d at 751, "significantly diminished [petitioner's] reasonable expectation of privacy." *United States v. Knights*, 534 U.S. at 120.

4. The State's Interest

On the State's side of the balance, the need to manage its parole system effectively is "overwhelming." *Penn. Bd. of Prob. and Parole v. Scott*, 524 U.S. at 365. The California Legislature has determined that "the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the supervision of and surveillance of parolees. . . ." Cal. Pen. Code § 3000 (a)(1). "Parole is first and foremost about supervising and controlling people who have demonstrated a propensity to break the law and for whom the State still has a responsibility to constrain and to mentor in connection with public safety." *United States v. Crawford*, 372 F.3d at 1071 (Trott, J., concurring.)

The difficulty attending the rehabilitation of parolees is exacerbated by the rate of recidivism. As this Court recently noted, "approximately 67 percent of former inmates released from state prisons were charged with at least one 'serious' new crime within three years of their release." *Ewing v. California*, 538 U.S. 11, 26 (2003). In California, 70 percent of the paroled felons reoffend within 18 months-

the highest recidivism rate in the nation. *United States v. Crawford*, 372 F.3d at 1069 (Trott, J., concurring). "And [parolees] have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because [parolees] are aware that they may be subject to supervision and face revocation of [parole] and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply. . . ." *United States v. Knights*, 534 U.S. at 120.

Furthermore, although probationers and parolees are often regarded as comparable in terms of the need for supervision, they are, in fact, quite different. "[A]s distinguished from those not convicted of anything, those convicted of mere misdemeanors and either jailed or not jailed, and those convicted of felonies but not imprisoned for lengthy periods, parolees are persons deemed to have acted more harmfully than anyone else except those felons not released on parole." *United States v. Crawford*, 372 F.3d at 1077 (Kleinfeld, J., concurring).

5. Striking The Balance

This balance of competing interests – the parolee's greatly diminished expectations of privacy and the State's need to supervise a person who was, and likely remains, a threat to society – justifies California's rule permitting

suspicionless searches of parolees' persons. Petitioner does not contend that a warrant or probable cause is necessary for such a search; *United States v. Knights*, 534 U.S. 112, and *Griffin v. Wisconsin*, 483 U.S. 868, foreclose such a claim. Rather, petitioner urges that the search of a parolee's person must be justified by reasonable suspicion. The necessity of such suspicion would strike an inappropriate balance of the competing interests.

Nonconsensual street encounters between police and citizens are generally governed by the reasonable suspicion standard announced in *Terry v. Ohio*, 392 U.S. 1. Thus, reasonable suspicion that a person is about to commit a crime justifies his detention; reasonable suspicion that he has a weapon justifies his search. Under petitioner's view of the law, a parolee would receive virtually as much protection from the Fourth Amendment as a citizen who was not on parole. The only difference would be the circumstance in which the officer had reasonable suspicion to believe that the person under investigation possessed incriminating evidence other than a weapon. In that situation, the non-parolee could not be searched, *Minnesota v. Dickerson*, 508 U.S. 366 (1993), but, petitioner submits, the parolee properly could be searched. Such a *de minimus* difference is wholly inadequate to serve the compelling state interest in the supervision of parolees.

As the Court has noted in discussing the compelling need for effective probation supervision, the goals of

rehabilitation and protection of the community (both of which are typically identified as the objectives of probation and parole) "require and justify the exercise of supervision to assure that the [probation or parole] restrictions are in fact observed. Recent research suggests that more intensive supervision can reduce recidivism. . . ." *Griffin v. Wisconsin*, 483 U.S. at 875. By contrast, petitioner's position would result in less, not more, supervision. To give but one example, the uncorroborated tip of an anonymous informant, does not amount to reasonable suspicion. *Florida v. J.L.*, 529 U.S. 266, 271 (2000). A parole agent or police officer, receiving an anonymous tip of wrongdoing by a parolee, would be powerless to investigate by the simple expedient of a search. True, the agent or officer could seek corroboration, but by the time the tip had been confirmed, the parolee may have vanished, secreting or disposing of his incriminating evidence.

As the California Supreme Court assessed the competing interests in *People v. Reyes*, "[t]he level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored. Moreover, the purpose of the search is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches." 19 Cal. 4th at 753, 80 Cal. Rptr. 2d at 740, 968 P.2d at 451.

C. Summary

The California rule is justified by the overwhelming need to supervise its more than 100,000 parolees, is consistent with the balance of interests struck by this Court in *Knights* and *Griffin*, and does not conflict with any decisions on which petitioner relies. There is no need for this Court to exercise its plenary authority in this case.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: July 7, 2005

Respectfully submitted,

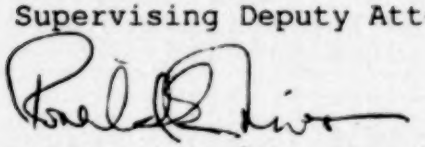
BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

MARTIN S. KAYE
Supervising Deputy Attorney General



RONALD E. NIVER
Deputy Attorney General
Counsel of Record

Counsel for Respondent

ORIGINAL

No. 04-9728

IN THE

SUPREME COURT OF THE UNITED STATES

Donald Curtis Samson, *Petitioner*

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

CERTIFICATE OF SERVICE BY MAIL

I RONALD E. NIVER, a member of the Bar of this Court hereby certify that on July 7, 2005, three copies of the **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** in the above-entitled case were mailed, first class postage prepaid, to

Martin Kassman
236 West Portal Avenue, PMB 475
San Francisco, CA 94127
Counsel for Petitioner

I further certify that all parties required to be served have been served.

RONALD E. NIVER
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
(Tel:(415) 703-5859)
Counsel for Respondent

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SUPREME COURT, U.S.

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: 415-703-5500
Telephone: 415-703-5859
Facsimile: 415-703-1234
E-Mail: ronald.niver@doj.ca.gov

July 7, 2005

Honorable William K. Suter
Clerk of the Court
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

RE: *Samson v. The People of the State of California*
Case No. 04-9728

Dear Mr. Suter:

Enclosed find the document entitled:

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Please file the original plus 10 copies of the above document. Please stamp and return the file endorsed Attorney General copy to this office in the self-addressed envelope enclosed.

Sincerely,

Ronald Niver/dd
RONALD E. NIVER
Deputy Attorney General

For BILL LOCKYER
Attorney General

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